EXHIBIT C

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**C.P. 9909-0363**
	:	
VS.	:	
	:	
ERIC NORRIS	:	

FILED
JUL 26 2005
Unit
First Judicial District of PA

OPINION

This matter was before this Court on a PCRA Petition. The case was originally tried before the Honorable Richard Klein. Following a bifurcated non-jury trial, where the evidence was overwhelming that Appellant brutally attacked a fellow patron in a night club, Judge Klein convicted Appellant of Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, Possessing an Instrument of Crime and Criminal Conspiracy. [1]Immediately following the pronouncement of the verdict, Appellant raised his hand and stated that he had wanted to testify but had been prevented from doing so by counsel. Therefore, Judge Klein allowed trial counsel, Edward Meehan, Jr., Esquire to withdraw and appointed new counsel, Louis B. Priluker, Esquire.

APPEALS
JUL 26 2005
DISTRICT ATTORNEY'S

On December 14, 2001, Judge Klein held an ineffectiveness hearing and determined that trial counsel was not ineffective. The Court then proceeded immediately to sentencing. Although the Commonwealth provided Appellant with notice of intent to seek the mandatory minimum sentence under 42 Pa.C.S.§9714, which required that Appellant be sentenced to

1 On the first day of trial, August 2, 2001, Appellant announced for the first time that he intended to present an alibi defense but was not prepared to do so on that date. Rather than continue the entire trial, the trial Court allowed the Commonwealth to present its case on August 2, but continued the defense case to August 21, 2001, so that Appellant could present this alibi witnesses.

twenty-five (25) to fifty (50) years imprisonment, Judge Klein refused to impose such a sentence. Instead, Judge Klein sentenced Appellant to ten (10) to twenty (20) years imprisonment on the aggravated assault conviction, and imposed concurrent terms of two and one half (2 1/2) to five (5) years imprisonment for possessing an instrument of crime and six (6) to twelve (12) years imprisonment for criminal conspiracy. [2]

The Commonwealth appealed, and on March 10, 2003, the Superior Court vacated the sentence and remanded the case for resentencing in accordance with 42 PA.C.S.§9714. [3] The matter was assigned to this court and Appellant was subsequently sentenced to a term of twenty-five (25) to fifty (50) years incarceration.

On June 2, 2003, Appellant filed a pro se PCRA Petition. Instant counsel, J. Matthew Wolfe, Esquire was appointed, and on March 23, 2004, counsel filed an Amended Petition. The Commonwealth responded and this Court ruled after reviewing the notes of testimony, the briefs of the Commonwealth and the defense that no additional hearing was needed and the Amended PCRA Petition was denied. The claims raised in Appellant's instant petition, filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §9541 et. seq., do not entitle him to relief.

On May 17, 1998, Charles Shamwell attended a graduation party for Phil Enoch, his girlfriend's brother, at Casablanca, a nightclub on Germantown Avenue in Philadelphia. Appellant was attending a birthday party for Alfredo Williams at the same club. At

---

2 The simple assault and reckless endangerment charges merged into the aggravated assault charge for sentencing purposes.

3 Although Appellant also filed a notice of appeal, he failed to raise any issues of his own on direct appeal. Instead, he merely responded to the Commonwealth's claim that it had provided Appellant with adequate notice of the mandatory minimum sentence. Accordingly, the Superior Court dismissed his appeal. Additionally, because Judge Klein had raised it in his Pa.R.A.P. 1925(a) Opinion, on direct appeal, the Commonwealth had also addressed whether trial counsel was ineffective for not advising Appellant of the possibility of a mandatory minimum sentence before he waived his right to a jury trial. The Superior Court, however, in light of Commonwealth v. Grant, 72 Pa. 48, 813

approximately 2:00 a.m. on May 18, Appellant's cousin Juan Canty, who was also attending Mr. Williams' birthday party, shoved a piece of cake into Mr. Enoch's girlfriend's face when she would not give him a piece of it. A fight ensued between Mr. Enoch, Canty, and several others, including Appellant, who tried to hit Mr. Enoch in the back of the head. Mr. Shamwell and other party guests attempted to break up the fight and Appellant, Canty and other brawlers were evicted from the club by security (N.T. 8/2/01, 13-27).

Shortly thereafter, Mr. Shamwell, his girlfriend Gwendolyn Enoch, and Wanda Jenkins left the club. As Mr. Shamwell held open the door for the women, Appellant came up behind him and hit him twice in the back of the head with "The Club," a metal security device used to lock car steering wheels, causing Mr. Shamwell to lose consciousness and fall to the ground. Appellant continued to hit the victim as he lay on the ground, and Canty, who had been in the middle of the street yelling obscenities, began jumping on the victim's chest. While Ms. Jenkins summoned police, Mr. Enoch tried to protect the victim. However, as soon as she had pulled one assailant away from Mr. Shamwell, the other would resume his attack. Ms. Enoch lost count of the number of blows Appellant inflicted on Mr. Shamwell, which were so severe that the victim's head was bouncing of the concrete. Eventually, she covered Mr. Shamwell's head with her own body (N.T. 8/2/01, 28-34, 59-61).

The attack did not stop until someone grabbed Appellant's arm as he prepared to swing the Club yet again. Canty and Appellant fled around the corner and drove away in a green Chevy Corsica. The car was stopped based on a police radio broadcast and the bloody Club was recovered. Canty was arrested, [4] but Appellant fled on foot. As a result of the attack, Mr.

A.2d 726 (2002), did not address this issue of ineffectiveness.

4 Canty, who also used the name Christopher Norris, subsequently pleaded guilty to his involvement in the attack on Mr. Shamwell.

Shamwell suffered broken bones in his left eye socket and lost hearing completely for two months. He received forty (40) stitches on the top of his head and eight (8) stitches on his left ear and was out of work for two (2) months (N.T. 8/2/01 33, 76-79, 94-95).

ISSUES RAISED ON APPEAL

A. After-Discovered Evidence.

Appellant asserts that he is entitled to relief based on the existence of after-discovered evidence that was purportedly unavailable to him at the time of trial. He claims that records from a halfway house, would "strongly suggest" that Appellant did not commit the assault on Mr. Shamwell. To the extent these records exist, they are merely cumulative of evidence already presented at trial. Thus Appellant is not entitled to relief.

After-discovered evidence provides a basis for relief only if the Appellant can establish by a preponderance of the evidence that (1) the evidence has been discovered after the trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) such evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) such evidence would likely compel a different verdict. Commonwealth v. Fiore, 780 A.2d 704, 711 (Pa. Super. 2001). Appellant has failed to meet these standards.

Appellant did not attach to his Amended Petition the very documents which he claims are after-discovered. Appellant states there exists some records from the halfway house where he was living at the time of the crime, which "should strongly suggest" that he did not commit the assault. It is Appellant's burden to set forth the basis of his claim and how he intends to prove his claim of after-discovered evidence with these alleged halfway house records. However, without knowing exactly what documents to which Appellant was referring, this Court was left to speculate about their purported unavailability, their admissibility, and whether they would have changed the outcome of Appellant's trial. The fact that Appellant failed to attach these documents to his Amended Petition calls into question whether he actually possesses them or not. Because Appellant failed to set forth the most basic information with which to decide his claim, the Court properly dismissed it.

Even if his claim were not dismissed for failure to attach the basis of his after-discovered evidence claim in his Amended Petition, Appellant still would not be entitled to relief. The Court has no idea what these halfway house records would show, since it was not provided with a copy of them to review. However, to the extent they might show that Appellant signed in at the halfway house prior to the time Mr. Shamwell was brutally assaulted, this evidence was already presented at trial. John Kelly, Appellant's friend and a former resident at the halfway house, testified at trial that he and Appellant socialized together on May 17, 1998 and that he dropped Appellant off at the halfway house at 10:45 p.m., prior to Appellant's curfew of 11:00 p.m. Mr. Kelly further stated he entered the halfway house with Appellant to say hello to some friends and observed Appellant sign the sign-in sheet. Mr. Kelly testified, from his own experience, that residents of the halfway house were not permitted to leave after they had signed-in and that this policy was strictly enforced (N.T. 8/21/04, 34-38). Thus, to the extent these halfway house records are the sign-in sheets, apparently showing that Appellant signed-in at approximately 10:45 p.m. on the evening prior to the assault on Mr. Shamwell, these records are merely cumulative of evidence already presented at trial. As such, Appellant is not entitled to relief on his after-discovered evidence claim. See Commonwealth v. Mason, 559 Pa. 500, 518, 741 A.2d 708, 718 (1999)(Appellant not entitled to relief on his after-discovered evidence claim, where evidence was merely cumulative or corroborative of other evidence already presented at Appellant's trial).

B. Ineffective Assistance of Trial Counsel

Appellant alleges that his trial counsel was ineffective on several grounds. To obtain relief on an effectiveness claim under the PCRA, Appellant is required to establish by a preponderance of the evidence that counsel's ineffectiveness "so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. §9543(a)(2)(ii); Commonwealth v. Payne, 794 A.2d 902, 905 (Pa. Super. 2002). To meet his burden and overcome the presumption of effectiveness, appellant must demonstrate:

> 1) that the underlying claim is of arguable merit; 2) that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate [Appellant's] interest; and 3) that there is a reasonable probability that the act or omission prejudiced Appellant in such a way that he outcome of the proceeding would have been different.

Commonwealth v. Lawson, 762 A.2d 753, 756 (Pa. Super. 2000), quoting Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261, 273 (2000). Appellant failed to meet these standards, his ineffectiveness claims must fail.

1) Failure to Call Witnesses

Appellant asserts trial counsel was ineffective for failing to present the testimony of three witnesses: Richard Warner, Tracey McGhee-Higgins, and Romaine Brown. Because the substance of these witnesses' testimony would have been merely cumulative of testimony already presented at trial, trial counsel cannot be deemed ineffective for failing to present them.

"To prove that counsel was ineffective for failing to investigate or call a witness, an Appellant must show how the testimony of the witness would have been beneficial under the circumstances of the case." Commonwealth v. Days, 718 A.2d 797, 803 (Pa. Super. 1998). Further, defendant must also establish that: 1) the witness existed; 2) such witness was available to testify for the defense; 3) counsel knew or should have known of the existence of the witness; 4) the witness was willing to testify for the defense; and 5) the absence of the testimony of such witness was so prejudicial as to have denied him a fair trial. Commonwealth v. Smith, 544 Pa. 219, 675 A.2d 1221, 1230 (1996). Appellant failed to meet these standards.

Appellant cannot establish the presentation of the proposed witness' testimony would have changed the outcome of his trial, as their testimony simply corroborates testimony already presented by the defense at trial. First, the affidavit from Mr. Richard Warner states that he was employed by the halfway house at which defendant was a resident, Onwards, Inc., at the time of the instant crime. He states that the halfway house had a curfew of 11 p.m. and that, after signing-in for the evening, the residents were not permitted to leave until the next morning (Amended Petition, 5). The substance of this testimony - as discussed above - was already presented to the Court at the time of trial via the testimony of John Kelly (N.T. 8/21/04, 34-38).

Additionally, Appellant now offers the testimony of both Tracey McGhee-Higgins and Romaine Brown. Neither of these witnesses observed the assault on Mr. Shamwell: however they both state that they were at Casablanca on the night of the instant crimes, but did not see Appellant there (Amended Petition, 6-8). This testimony simply corroborates the testimony of Gregory Brown. At trial, Mr. Brown testified he was at Casablanca on the night of the assault, but that Appellant was not there. Mr. Brown further testified he observed part of the assault, and that Appellant was not one of the men hitting Mr. Shamwell (N.T. 8/21/01, 6-9). Because the testimony of all three proposed witnesses merely corroborates testimony of witnesses who were already presented at trial, counsel cannot be deemed ineffective for failing to present them. See Commonwealth v. Mason, 559 Pa. 500, 741 A.2d 708 (1999) (where the proposed evidence is merely cumulative of the testimony already presented by the defense and/or Commonwealth at trial, trial counsel cannot be deemed ineffective for not presenting such evidence); Commonwealth v. Showers, 782 A.2d 1010, 1022 (Pa. Super. 2110) (counsel cannot be deemed ineffective for failing to pursue cumulative evidence).

2) Jury Waiver Colloquy

Appellant next asserts that trial counsel did not inform him that he would be facing a mandatory sentence of twenty-five (25) to fifty (50) years. He further claims this alleged failure somehow vitiates his decision to waive his right to a jury.

Where an Appellant claims he waived a jury trial based on inaccurate information regarding sentencing possibilities, he must establish both that the colloquy misrepresented the possible sentences and that Appellant relied on that misrepresentation in waiving his right to a jury trial. Commonwealth v. Golinsky, 426 Pa. Super. 319, 327-29, 626 A.2d 1224, 1229-30 (1993); Commonwealth v. Byng, 364 Pa Super. 636, 640, 528 Pa. 983, 985 (1987), citing Commonwealth v. Carey, 235 Pa Super. 366, 372, 240 A.2d 509, 511 (1975). As the record in this case demonstrates Appellants meets neither of the prongs of this test.

First, the trial Court did not misrepresent the possible sentence Appellant faced. During the waiver colloquy, the trial Court informed Appellant that he faced a possible aggregate maximum sentence of twenty-two and one half (22 1/2) to forty-five (45) years imprisonment if he received maximum, consecutive sentences (N.T. 8/2/01, 5). This was, in fact, the correct information had Appellant not been a recidivist. Defendant was, of course, subject to a sentence of twenty-five (25) to fifty (50) years. However, because the trial Court did not know of the Appellant's two prior violent felony convictions, that information was not erroneous. Commonwealth v. Scott, 345 Pa. Super. 86, 88-89, 497 A.2d 656, 658-59 (1985). In Scott, the trial Court advised appellant during his waiver colloquy that he faced a maximum sentence for third degree murder of ten (10) to (20) years imprisonment. However, because appellant had prior murder convictions, he was subject to a mandatory term of life imprisonment to 42 Pa. C.S. §9715. The Superior Court found that the trial Court did not commit error because it did not know of Appellant's prior record at the time of the colloquy. Id. Thus, the Superior Court found the Appellant's claim of trial counsel's ineffective for failing to advise him of the mandatory life sentence lacked arguable merit. Id.at 658. Furthermore, in Commonwealth v. Kisner, 736 A.2d 672, 674 (Pa. Super. 1999), the Superior Court stated.

The colloquy has to do with the important constitutional right to a trial by a jury. We find no authority requiring a court to mention penalty at all when conducting an examination of the accused before accepting the waiver. See Pa.R.Crim.P. 1101. Given the distinct purpose of the colloquy, we see no reason to create such an inapplicable requirement. Id. Scott and Kisner control this case.

Here, prior to waiving a jury, Appellant was informed that his maximum sentence would be twenty-two and one half (22 1/2) to forty-five (45) years. At that time, Judge Klein was not aware of Appellant's other convictions, which subjected him to a mandatory sentence of twenty-five (25) to fifty (50) years. Because Judge Klein's statement of Appellant's possible penalty was correct at the time and because the discussion of penalty is not required in a jury waiver colloquy, Appellant's claim must fail. Kisner, supra; Scott, supra.

Furthermore, Appellant cannot assert that the decision to waive a jury was at all the result of Judge Klein's statement of his maximum possible sentence. During an ineffectiveness hearing on other matters, Appellant testified that he agreed to waive a jury trial because his witnesses were not available and he wanted to proceed with a bifurcated trial to ensure their presence (N.T.

12/14/01, 86, 90-100). 5 Furthermore, trial counsel, testified that he routinely recommended waiver trials before Judge Klein, because he felt that his clients, including Appellant, had a better chance of acquittal before Judge Klein than with a jury (N.T. 12/14/01, 53). This testimony, which Judge Klein credited in his ineffectiveness hearing, rather than establishing that Appellant waived his constitutional rights based on an erroneous understanding of the sentence, refutes such an assumption. Accordingly, Appellant's claim that his trial counsel was ineffective for purportedly not informing him of his mandatory sentence of twenty-five (25) to fifty (50) years, rather than the twenty-two and one half (22 1/2) to forty-five (45) year maximum sentence must fail. See Commonwealth v. Kisner, 736 A.2d 672, 674 n.4 (Pa.Super. 1999) (rejecting ineffectiveness claim where Appellant received sentence higher that that set forth in colloquy but defendant did not allege that error in colloquy affected decision to waive jury); Golinsky, supra (rejecting ineffectiveness claim where counsel did not corroborate Appellant's assertion that he would not have waived a jury trial had he known about the mandatory minimum sentence); Byng, supra (rejecting ineffectiveness claim where Appellant failed to make factual showing that incorrect sentencing information in colloquy effected decision to waive jury); compare Carey, supra, 235 Pa. Super. at 371, 340 A.2d at 511 (trial counsel ineffective where both Appellant and counsel testified that Appellant's waiver was based on erroneous sentencing information from counsel).

C. Right to a Speedy Trial

Appellant also claims that his trial counsel was ineffective for not asserting his right to a speedy trial, pursuant to Pa.R.Crim.P. 600, and that he was prejudiced thereby. Because Appellant's Rule 600 claim would not afford him relief, counsel was not ineffective for not

---

raising it prior to trial.

Rule 600 requires the Commonwealth to bring an accused to trial within 365 days after the complaint is filed. Pa.R.Crim.P. 600(A)(2), (E), (G). Excluded from the 365 day computation is any period of delay, at any stage of the proceeding that is the result of the unavailability of the accused or his lawyer. Pa.R.Crim.P. 600 (C), (G); Commonwealth v. Cook, 676 A.2d 639, 646 n. 14, n. 15 (Pa. 1996); Commonwealth v. DeBlase, 665 A.2d 427, 431 (Pa. 1995). Moreover, even if the defendant is tried after the adjusted Rule 600 run date, he is not entitled to a discharge where the Commonwealth has exercised due diligence in bringing him to trial and "the circumstances occasioning the postponement were beyond the control of the Commonwealth." Pa.R.Crim.P. 600 (G); Commonwealth v. Matis, 710 A.2d 12, 16 (Pa. 1998). In considering the grant or denial of Rule 600 relief, the Court will view the evidence in the light most favorable to the prevailing party - here, the Commonwealth. Commonwealth v. Vesel, 751 A.2d 676, 680 (Pa. Super. 2000), citing Commonwealth v. Edwards, 595 A.2d 52, 53 (Pa. 1991).

The Commonwealth filed a complaint against Appellant on June 12, 1999. The mechanical run date was therefore June 11, 2000. On June 18, 1999, Appellant failed to appear for a court listing, a bench warrant was issued for his arrest, and the case was continued to July 8, 1999. On November 12, 1999, the defense requested a continuance, and the case was continued to November 23, 1999. On April 17, 2000, defense counsel again requested a continuance, and the case was continued to April 20, 2000. On that date, the defense litigated a motion to suppress, which was denied, and the case was continued to September 6, 2000. Accordingly for purposes of Rule 600, trial commenced on that date See Commonwealth v. Jones, 434 A.2d 1197 (Pa. 1983). Moreover even if trial had not commenced on that date Appellant still would be entitled to a relief.

On November 2 2000, the defense again requested a continuance, and indeed did so for the next three consecutive listings - January 4, 2001, January 26, 2001, and March 30, 2001, respectively. The next listing was May 21, 2001. Thus, simply on the basis of delay attributed to the defense alone, 375 excludable days must be added to the mechanical run date, resulting in an earliest possible adjusted run date of June 20, 2001. See Rule 600(C)(3); Cook, 676 A.2d at 646 n. 14, n. 15 (time attributable to defense continuance requests is excludable); Commonwealth v. Hill, 736 A.2d 578, 587 (Pa. 1999)(Appellant is unavailable for trial, and therefore time is excludable for Rule 600 purposes, where delay is created by pre-trial defense motions and Commonwealth is diligent in response). Appellant's trial began on August 2, 2001 - less than three months later.

Thus, the sole issue is whether the trial Court properly concluded that the Commonwealth was duly diligent in bringing Appellant to trial. In meeting the standard of due diligence, the Commonwealth is not required to do everything conceivable to bring Appellant to trial. Rather, all that is required is that the Commonwealth makes reasonable efforts. Commonwealth v. Polsky, 426 A.2d A.2d 610, 613 (Pa. 1981); see also Hill, 736 A.2d at 588 ("[d]ue diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth"). In assessing due diligence, the relevant inquiry is whether the Commonwealth demonstrated due diligence at the last listing before the run date and all subsequent listings. See Commonwealth v. Corbin, 568 A.2d 635, 637 (Pa.Super. 1990)(critical date is last listing before former Rule 1100 run date); Commonwealth v. Nellom, 565 A.2d 770, 773 n.6 (Pa. Super. 1989)("Commonwealth need not establish its due diligence for the listings that proceed the final listing before expiration of the mechanical run date.") see also Commonwealth v. Brawner, 553 A.2d 458, 460 (Pa. Super. 1989); Commonwealth v.

Hollingsworth, 499 A.2d 381, 387 (Pa. Super. 1985)(en banc).

The last listing before the adjusted run date was May 21, 2001. On that date, the Court was on trial, and thus unable to proceed with Appellant's trial. At the subsequent listing - July 12, 2001 - the Court was on vacation and thus, again unavailable to proceed with trial. Appellant's trial began at the very next listing - August 2, 2001. The Commonwealth was duly diligent in bringing Appellant to trial, as all continuances after the adjusted run date were attributable to the Court's scheduling conflicts and overcrowded docket. Indeed, at none of the listings did the Commonwealth ever request a continuance. Judicial delay is certainly beyond the control of the Commonwealth and extends the Rule 600 period. See Commonwealth v. Spcnce, 627 A.2d 1176, 1181 (Pa. 1993)("[j]udicial delay can support the grant of an extension of the Rule [600] run date"); Commonwealth v. Peer, 684 A.2d 1077, 1082 (Pa. Super. 1996) ("court congestion may provide a reasonable explanation for the inability to try a defendant within the prescribed time period"); Commonwealth v. Bell, 562 A.2d 849, 851 (Pa. Super. 1990) ("judicial delay caused by an overcrowded docket is a valid reason to extend Rule [600]'s timetable"). The Commonwealth had no control over the court's docket and, as the Pennsylvania Supreme Court has made clear, "[t]rial courts are not required to rearrange their dockets to accommodate Rule [600] run dates." Commonwealth v. Wilson, 672 A.2d 293, 301 (Pa. 1996). Thus because Appellant would not have prevailed on his Rule 600 claim, defense counsel cannot be deemed ineffective for failing to assert such a meritless claim. See Commonwealth v. Ray, 751 A.2d 233, 236 (Pa. Super. 2000)(counsel will not be deemed ineffective for failing to pursue a meritless claim").

D. Hearing

Appellant failed to make a threshold showing to this Court that his claims had any merit whatsoever. His petition, therefore, was properly dismissed without a hearing. See Commonwealth v. Granberry, 434 Pa. Super. 524, 644 A.2d 204 (1994)(PCRA court may deny petition without a hearing if it determines claims raised are without merit and would not entitle defendant to post-conviction collateral relief); Commonwealth v. Brimage, 398 Pa. Super. 134, 580 A.2d 877, 881 (1990)(same); Pa.R.Crim.P. 907.

For all of the above reasons the Appellant's appeal should be dismissed.

BY THE COURT:

Shelley Robins New

ROBINS NEW, J.